No. 97150-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KENNETH CHANCE BROOKS,

Petitioner,

v.

STATE OF WASHIGNTON,

Respondent.

BRIEF OF WACDL AS AMICUS CURIAE OBO PETITIONER, KENNETH CHANCE BROOKS

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Petitioner Kenneth Brooks. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has around 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

II. ISSUE OF CONCERN TO AMICUS

Do CrR 2.1(d) and article 1, section 22 of the Washington Constitution permit the late amendment of the Information to conform to the defendant's testimony regarding the charged offense?

III. ARGUMENTS AND AUTHORITY

Characterizing this case as having "unique facts," the Court of Appeals affirmed the trial court's decision to allow the late amendment of the charging document after the defendant testified. What makes this case "unique," however, is not the legal principles, which are well-settled, but the defendant's in-court testimony. Specifically, the defendant admitted under oath to molesting the victim, not in January as charged, but four

months later in May. While an in-court confession of this nature may be "unique," applying established legal and constitutional principles leads to only one conclusion: the late amendment was improper and reversal is required.

The applicable rule governing amendments is CrR 2.1(d), which reads, "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." Therefore, whether to allow an amendment turns whether the defendant was prejudiced by the amendment.

In most instances, the amendment of an incident date will be a ministerial or technical decision rarely effecting substantial rights. But case law acknowledges that the date of the incident is essential to a claim of alibi. *State v. Goss*, 189 Wn.App. 571, 358 P.3d 436 (2015). This is true because the defense theory is built around a particular date. In Mr. Brooks' case, the situation is analogous to an alibi situation: the defendant testified he had no contact, sexual or otherwise, with the victim on the date charged, testifying instead to an incident four months later.

Although the Court of Appeals did not use the phrase, it essentially permitted the late amendment to conform to the evidence. Although such amendments are liberally allowed in civil cases, see CR 15(b), no such

rule exists in the criminal context. As one Court put it, "[T]he question is not what the evidence showed but what the indictments alleged (or failed to allege) since, contrary to the rule in civil cases, indictments are not deemed amended to conform to the evidence." *Tuggle v. State of Georgia*, 145 Ga.App. 603, 244 S.E.2d 131 (1978) (citation to civil rule omitted).

Prior to 1984, Washington's criminal court rules allowed amendments to conform to the evidence. See *State v. Primeau*, 70 Wn.2d 109, 422 P.2d 302 (1966). Former RCW 10.37.020 read: "At any time before or during trial the court may permit the amendment of an information and permit proof to be offered in support thereof, and if the defendant shows to the satisfaction of the court that he would thereby be misled, the court shall make such order as shall secure to the defendant full opportunity to defend. An information shall be considered amended to conform to the evidence introduced without objection in support of the crime substantially charged therein, unless the defendant would thereby be prejudiced in a substantial right." *State v. Olds*, 39 Wn.2d 258, 260, 235 P.2d 165 (1951).

But even under this former "liberal rule," Washington courts still required the evidence be "in proof of a Crime substantially charged." *Primeau* at 115. Article 1, section 22 of the Washington Constitution requires the defendant know the nature of the charges against him. This

requirement "makes it mandatory that defendants in criminal cases must be convicted of the offenses charged and guilt of other offenses will not suffice." *Olds* at 261. Accord *State v. Gehrke*, 193 Wn.2d 1, 7, 434 P.3d 522 (2019). In *Olds*, the defendant was charged with subsection (1) of the larceny statute but the judge instructed the jury on both subsections (1) and (4). The Supreme Court reversed saying, "Since the appellants may have been convicted of an offense with which they were not charged, the judgment must be reversed." *Olds* at 261. The Court in *Primeau* relied on *Olds* to hold that a late amendment to conform to the evidence was prejudicial error.

RCW 10.37.020 was repealed in 1984 and replaced by CrR 2.1(d), thereby omitting any reference to amending to conform to the evidence. Three years later, in 1987, this Court decided *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987). In *Pelkey*, the defendant was charged with bribery. At the conclusion of the State's case-in-chief, the defense moved to dismiss due to a failure to prove one of the elements. The State responded by moving to amend the charge to a different charge. This Court held, "A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause

of the accusation against him or her. Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1[(d)]."

This Court recently reaffirmed the *Pelkey* holding in *State v. Gehrke*, 193 Wn.2d 1, 434 P.3d 522 (2019). In *Gehrke*, the State moved at the end of its case-in-chief to amend the charging document to add a manslaughter charge. This Court reversed and vacated the conviction. As this Court explained, the issue of substantial prejudice turns on whether the "defendant has an opportunity to respond meaningfully to the amendment." *Gehrke* at 10, citing *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993).

Amicus has been able to find only one state, Arizona, which still allows late amendments to conform to the evidence in criminal cases. But even in Arizona, the rule is very limited, permitting such amendments only to correct mistakes of fact or remedy formal or technical defects. In *State of Arizona v. Johnson*, 198 Ariz. 245, 8 P.3d 1159 (2000), the State charged the defendant with, count 1, penetrating the child victim with his finger and, count 3, causing the victim to touch his penis with her hand. At trial, the victim instead testified to penile, not digital, penetration, and touching with the mouth, but not the hand. The trial court granted a motion to amend to conform to the testimony, but the Arizona Court of

Appeals reversed. The Court of Appeals found the amendment was improper and prejudiced the defendant, noting the amendment violated two constitutional rights: the right to "notice of the charges against the defendant with an ample opportunity to prepare to defend against them" and the right to be free from double jeopardy. *Johnson* at 248. The Court added that an "ample opportunity to prepare to defend against amended charges generally must occur before the state has rested its case." *Johnson* at 249.

The State of Indiana's amendment rule, which reads very similar to CrR 2.1, has been interpreted as allowing amendments to conform to the evidence. *Martin v. State of Indiana*, 537 N.E.2d 491 (Ind. 1989). But again, the issue is substantial prejudice to the defendant. In *Martin*, the defendant was charged with delivering drugs to an undercover police officer. The testimony of the officer was that he did not receive the drugs directly from the defendant, but that the defendant handed the drugs to a third person who in turn handed the drugs to the officer. The Court held that the late amendment of the charging document did not prejudice the defendant because it did not "affect any particular defense or change the positions of either of the parties." *Martin* at 494.

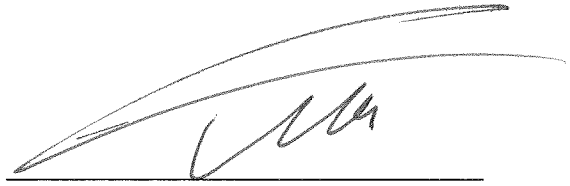
In Mr. Brooks case, the defense theory was that the defendant did not molest the victim during the charged period. Through cross-

examination of the victim, defense counsel confirmed that the dates alleged in the charging document were the same dates alleged by the victim. The defendant then testified he had no contact, sexual or otherwise, with the victim during the charging period, although he did have sexual contact with her four months later. The late amendment of the charging document to conform to this evidence substantially prejudiced the defendant and violated his rights under article 1, section 22 to know the nature and cause of the accusation against him. He was substantially prejudiced because he did not have the opportunity to respond meaningfully to the amendment. The late amendment should not have been permitted and reversal is required.

IV. CONCLUSION

For the foregoing reasons, the Court of Appeals decision should be reversed.

Respectfully submitted this 3rd day of October, 2019.



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